INDEX

329-087—69——1

CITATIONS

Cases:

In the Supreme Court of the United States

October Term, 1968

No. 273

Russell Scofield, et al., petitioners

v.

National Labor Relations Board and International Union, UAW

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 151–161) is reported at 393 F. 2d 49. The Board's decision and order (R. 125–150, 52–125) are reported at 145 NLRB 1097.

JURISDICTION

On March 5, 1968, the court of appeals filed its opinion denying the petition to review and set aside the order of the National Labor Relations Board dismissing the unfair labor practice complaint, and, on the same date (R. 1), the court entered a judgment in accordance with that opinion (R. 162–163). On April 16, 1968, the court issued a formal decree restat-

ing its earlier judgment (R. 167–168). The petition for a writ of certiorari, invoking this Court's jurisdiction under 28 U.S.C. 1254(1), was not filed until July 6, 1968.

On October 14, 1968 (R. 169), the petition was granted, reserving for decision after argument the question whether the petition was timely. For the reasons discussed *infra*, pp. 28–31, we believe the petition was not filed within the time allowed by 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

1. Whether a labor union restrains or coerces employees in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act, in violation of Section 8(b)(1)(A) of the Act, by fining its members for violating restrictions upon incentive earnings previously promulgated in a union by-law and acquiesced in by the employer.

2. Whether the petition for a writ of certiorari was filed within the 90-day period prescribed by 28 U.S.C. 2101(c).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall also have the right to refrain from any or all such activities * * *. [29 U.S.C. 157].

Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *. [29 U.S.C. 158(b)(1)].

STATEMENT

1. Since 1937, Local 283 of the United Auto Workers has been the bargaining representative of the production employees of the Wisconsin Motor Corporation. The current collective bargaining agreement, like many of its predecessors, requires the employees either to join the union and maintain good standing, or to decline membership and pay a service fee to the union (R. 126). About half of the company's 850 production employees are compensated on a piecework or "incentive" basis, which enables them to earn more than their basic hourly wages by producing at a rate in excess of established norms of hourly output (R. 61-62).

Under the collective agreement, all incentive work is classified into five different grades according to the skills involved, and for each grade a minimum hourly rate, called the "machine rate," is established (R. 46, 47, 50). This machine rate fixed in the contract reflects a determination, on the basis of time studies, of the number of pieces of work an average operator would turn out in an hour—after an adjustment for such factors as picking up and cleaning tools, fatigue, and

personal needs (R. 61–62, 22–24, 34). Employees who produce at less than the machine rate are still paid that rate (R. 61, 23).[1] But by taking less time than that allowed for the factors just mentioned, the average operator can exceed the machine rate. Since the company is willing to pay the employee for production in excess of the machine rate, the employee can in this way increase his income (R. 23–24).

In 1944, the members of the local, concerned that the company's incentive system might lead to dissension and might disadvantage older workers (see, *infra*, pp. 20–23), adopted a by-law requiring that members "turn in no more than 10 cents per hour over and above machine rates" (R. 63).[2] With minor modifications, the rule has remained in force over the years, but the "ceiling" has been raised several times as a result of collective negotiations with the company (see *infra*, p. 7).[3] In 1946, the membership voted to impose fines for violation of the rule (R. 63, 4).

In its current form, the union's rule provides (R. 48):

[1] The contract provides (R. 46):

A. Jobs shall be so priced as a result of a time study that the average competent operator working at a reasonable pace shall earn not less than the machine rate of his assigned task. There is a lower rate, called the "day rate," which applies in certain situations not relevant here (R. 32, 47).

[2] This formal rule superseded a "gentleman's agreement," in effect since 1938, which recommended that "pieceworkers turn in no more than time and a half in any one day in order to conserve work and avoid layoffs" (R. 63, 3).

[3] At the time of the Board proceeding, the ceiling rate was between 45 and 50 cents per hour above the machine rate (R. 64, 65n. 11).

A. The basic objective of the Union is, to protect members of the Union in their employment and to give them as much security as the industry can provide. The Local Union in its judgment and reasoning has established a production ceiling which it feels will bring more protection to the members. It follows that a member who is found in violation of this rule is guilty of conduct unbecoming a Union Member.

B. Any member violating these ceilings, shall be subject to a fine of One Dollar ($1.00) for each violation. The violators shall be processed by not less than 3, nor more than 5 Members of the Executive Board.

In case of persistent ceiling violations, the member will be charged with conduct unbecoming a Union Member.[4]

As the rule has been consistently interpreted and applied, a member does not commit a violation by performing excessive work. Rather, the rule limits what a member may enter on his work card for the purpose of *current* compensation by the company (R. 64, 11–13). The employee remains free to produce in excess of the ceiling rate, and, if he does, the extra production physically enters the flow of company operations (R. 64, 10–11, 24–25). Insteadof reporting any excess

[4] Article 30 of the Constitution of the International Union provides a detailed procedure of charges, trial, and penalty for "conduct unbecoming a member of the Union." The penalty includes suspension and a fine ranging from $1 to $100. (R. 51–52.) The fairness of these procedures is not questioned.

production to management for immediate compensation, the union member is simply expected to "bank" his earnings in excess of the ceiling, and hold them in reserve for occasions when he would otherwise earn less than the ceiling[5] (R. 64, 11-12). The union rule does not, of course, curtail the company's right to require a full day's work from the employee (R. 36-38). Nor does it absolutely prevent the employee from deriving direct benefit from his excess production.

The company does not consider itself bound by the ceilings and the banking procedure, and, if an employee reports all production for immediate payment, the company makes full payment notwithstanding a violation of the union's ceilings (R. 65, 12). Since the ceilings were first promulgated, however, the company has, in a number of ways, acquiesced in their implementation. It permits an employee to bank excess production for later payment (provided that all banks are depleted by annual inventory time) (R. 65, 25), and will pay him for this production during subsequent non-productive periods (R. 26, 10-11). The company has also cooperated with the union in policing the rule; it not only supplies the union with the employees' work cards but also pays the union stewards for the time spent in checking the cards (R.

[5] For example, when an employee is unable to produce because his machine is not operating, the bargaining contract provides that the company will compensate him at either the machine rate or the lower day rate (n. 1, *supra*), depending on the specific reasons for nonproduction. At these times, the union permits the member to draw upon his "bank," and thus, by collecting for work previously produced but not reported for compensation, to earn the higher ceiling rate for a period during which he produced nothing. (R. 64, 11-12, 27-28.)

67–68, 17).[6] The company has also permitted the union to post the ceilings on plant bulletin boards (R. 4, Tr. 396–397).

Although the ceilings are not contractually binding on the company, they have frequently been the subject of bargaining, with the company proposing their elimination and then compromising on an increase in the level at which the ceilings are set (R. 68, 8–9, 13, 42–43). For instance, the 1953 contract (G.C. Exh. 17) provided that the previous agreement be modified to "Increase the ceilings on all piece work jobs a total of thirteen cents per hour effective July 1, 1953 over the ceilings of piece work jobs in effect on April 30, 1953." Similarly, the strike settlement agreement of August 14, 1956 provided (R. 49) that "The ceilings on earnings is [sic] to be raised ten cents (10¢) per hour above the general increase of 1–1–56 and the ten cents (10¢) of 5–1–56 or a total of 23¢ per hour."[7] Then, again, in the course of the 1959 contract negotiations, the company requested that the ceilings be increased ten cents per hour (R. 13).

In addition, the company uses the ceiling rate as a point of reference in computing the new piece rate after an increase in the hourly machine rate has been negotiated (R. 69, 17–18). Furthermore, when, as often happens, as a result of constant retooling (Tr. 269), a

[6] The collective agreement provides that the Company shall pay the stewards for time spent on legitimate union business, engaged in during working hours (R. 68). The compliance procedure is set out at R. 65–66.

[7] To achieve that raise in the ceilings, the company agreed to satisfy certain grievances and to increase vacation benefits (R. 8–9).

piecework job is retimed, the affected employees are guaranteed a minimum rate equal to their previous average earned rate for that job. (Cont. par. 92, Sec. 3(B); Tr. 268–272). Since the average rate for most employees closely approximates the ceiling rate, it—rather than the machine rate—may actually be the *de facto* basic wage rate (R. 21, Tr. 250, 268–272). Reflecting this fact, the company has passed on grievances involving allowances for specific jobs by relying on whether the employees had or had not "made ceiling" on them (R. 69, Tr. 304–305).

In the light of these and other factors, the Board concluded that "the company * * * as a practical matter has accepted the ceilings as an integral part of the *modus operandi* and has recognized the ceilings as forming an important element of its negotiated wage structure" (R. 128).[8]

2. In February 1961, the union conducted its semi-

[8] Although company representatives testified that they were opposed to the union's banking system and preferred to let employees "earn as much as they can" (R. 70), they did acknowledge certain management advantages in the system. For example, plant superintendent Bohmann stated that there was a financial saving to the company when an employee draws against his bank for compensation during a "down time" instead of receiving his machine rate (R. 12, 27–28). He also acknowledged that the company's production performance in this industry of high skill and precision was characterized by a low scrap rate, which might well be jeopardized if employees became excessively pre-occupied with sheer quantity of production (R. 71–72, 28–29). Moreover, the company has paid dividends without interruption every year since 1946, when the union first began enforcing its banking system (R. 73). And, despite the union's ceilings the average hourly earnings of the company's incentive employees exceed that of employees in comparable local establishments (R. 20–21).

annual examination of employee work cards (see R. 65–66) and found that six of its members had violated the banking system by reporting to the company, for immediate payment, production at a rate in excess of the ceilings (R. 66, 40–41). The union served written charges upon each of the six members and notified them of their impending trial.[9] As a result of the trials, all six members were fined in amounts ranging from $50 to $100. Two members subsequently paid their fines but the four petitioners refused. Instead, they filed unfair labor practice charges with the National Labor Relations Board.[10] It is undisputed that no action has been taken or threatened by the union that would in any way impair or affect petitioners' employment status (R. 127–128, 83).

3. The Board concluded that the union's conduct had not violated Section 8(b)(1)(A) and accordingly dismissed the complaint. Agreeing with the Trial Examiner, the Board held that Congress did not intend by that section to prohibit the type of union discipline here involved (R. 132–136). The court of appeals affirmed R. 151–161).

SUMMARY OF ARGUMENT

I.

A. Section 8(b)(1)(A) of the National Labor Relations Act makes it an unfair labor practice for a union

[9] The members were permitted to have counsel, and there is no contention that the union disciplinary machinery failed to comport with the requirements of fair procedure.

[10] On October 2, 1961, the union filed suit in a Wisconsin state court to collect amounts assessed (R. 53). On February 7, 1968, the trial court dismissed the suit, but the union has appealed. *UAW* v. *Schofield*, County Court of Milwaukee County, Wisconsin, Case No. 518–597.

to "restrain or coerce" employees in the exercise of rights guaranteed to them by Section 7. In *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, the Court held that a union did not commit an unfair labor practice by fining, and seeking judicial enforcement of those fines, against those of its members who worked during an authorized strike. However, in *National Labor Relations Board* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, the Court sustained the Board's holding that it *was* a violation of Section 8(b)(1)(A) for a union to expel a member for filing an unfair labor practice charge against the union with the Board in violation of a union rule requiring prior exhaustion of internal remedies.

Read together, *Allis-Chalmers* and *Shipbuilding Workers* teach the general proposition that union enforcement of legitimate membership rules by reasonable means will not be found to violate Section 8(b)(1)(A) of the Act, unless the union action clearly conflicts with other, predominant federal policies. The present case falls well within this general rule. The court below thus acted properly in sustaining the Board's determination that the union here did not offend Section 8(b)(1)(A) by imposing reasonable fines on those of its members who collected earnings in excess of its ceiling rule, or by suing in a state court to enforce the fines.

B. Under the company's piecework, incentive pay system, an employee who takes less time than that allowed for such factors as fatigue and personal needs can produce at a rate in excess of the norm (the "ma-

chine rate") established by time studies, and thereby increase his earnings. Unions traditionally have been opposed to incentive pay systems, fearing that they could result in employees working themselves out of jobs, lowering piece-rates, fostering employee jealousies, and impairing employee health. Reflecting these concerns the union since 1944 has, by membership rule, placed a ceiling on the amount above the established hourly rate which an employee-member may claim as current earnings; the rule further provides for moderate fines against members who violate the ceiling.

As the Board found, a union has a legitimate interest in protecting the job opportunities of its members, avoiding jealousy and dissension among them ,and preserving their health. The ceiling rule is reasonably related to achieving these legitimate union objectives and it does so with the minimum impact on employee and employer interests. The rule does not preclude the employee from producing in excess of the ceiling, nor does it keep such excess production out of the company's operations. It merely requires an employee to forego demanding immediate compensation for the excess production, and instead to "bank" those earnings for a later time, when their receipt would be less likely to disrupt employee morale and working conditions.

C. Petitioners opted to become full members of their union, not simply to pay a service fee. Under prevailing standards their membership contractually

obliged them to respect the union by-laws, including the requirement of compliance with the ceiling rule.

D. The union's ceiling rule does not encourage or result in a "slowdown" in any commonly accepted sense. As noted, the rule does not preclude an employee from producing in excess of the ceiling if he so desires. Moreover, the collective agreement merely requires the employee to produce at a level commensurate with the guaranteed hourly or "machine rate." There is nothing in the ceiling rule—which is set well above the machine rate—that would preclude the company from disciplining employees for failing to produce in accordance with the machine rate or to turn out a full day's work.

Nor is the ceiling-banking system in derogation of the collective bargaining process. Although the system was first established by the union more than twenty years ago and is not specifically incorporated in the collective agreement, the facts here show that its development over the years has been a product of bilateral adjustment and compromise. The ceilings have frequently been the subject of collective bargaining between the company and the union, and the system is dependent for its operation upon company cooperation. In sum, as the Board found (R. 128), "the Company * * * has accepted the ceilings as an integral part of the *modus operandi* and has recognized the ceilings as forming an important element of its negotiated wage structure."

II.

On March 5, 1968, when the court of appeals filed its opinion in the case concluding that the petition to review the Board's dismissal of the complaint should be denied, it entered a judgment to the same effect. On April 16, 1968, the court issued a decree which restated the terms of its earlier judgment. The March 5 judgment constituted a full and effective determination of the rights and obligations in suit; the April 16 decree was superfluous, merely restating what had been ordered by the March 5 judgment. In these circumstances, the time specified by 28 U.S.C. 2101(c) for filing a petition for a writ of certiorari ran from the date of the March 5 judgment. The petition is thus untimely, for it was not filed until July 6, 1968, some 123 days after entry of the controlling judgment.

ARGUMENT

I.

SECTION 8(b)(1)(A) OF THE NATIONAL LABOR RELATIONS ACT DOES NOT PROHIBIT A UNION FROM ENFORCING BY FINES RESTRICTIONS UPON INCENTIVE EARNINGS SET FORTH IN ITS BY-LAWS AND ACQUIESCED IN BY THE EMPLOYER

A. INTRODUCTION: THE STANDARDS SET BY *ALLIS-CHALMERS*

Section 8(b)(1)(A) of the National Labor Relations Act makes it an unfair labor practice for a union to "restrain or coerce" employees in the exercise of rights guaranteed by Section 7. Under Section 7 employees are guaranteed the right to form, join, or assist labor organizations, and "the right to refrain from any or all such activities." A proviso to Section

8(b)(1)(A) preserves the right of a union "to prescribe its own rules with respect to the acquisition or retention of membership therein."

In *National Labor Relations Board v. Allis-Chalmers Mfg. Co.,* 388 U.S. 175, this Court agreed with the Board that a union does not violate Section 8(b)(1)(A) by imposing fines—and subsequently seeking judicial enforcement of its fines—against those of its members who work during an authorized strike. The Court's conclusion rests principally on the following considerations:

First, Section 8(b)(1)(A) is "only one of many interwoven sections in a complex Act," and thus it must be read in light of the over-all national labor policy fashioned by Congress (388 U.S. at 179-180) (citation omitted). A basic tenet of American labor law is that "the national labor policy [has] vested unions with power to order the relations of employees with their employer" (*id.* at 181). This necessarily "creates a power vested in the chosen representative to act in the interests of all employees" (*id.* at 180), and, even though the "employee may disagree with many of the union decisions * * * [he] is bound by them. 'The majority-rule concept is today unquestionably at the center of our federal labor policy'" (*ibid.*) (citations omitted). An indispensible corollary "to this federal labor policy has been the power in the

chosen union to protect against erosion [of] its status * * * *through reasonable discipline of members who violate rules and regulations governing membership*" (*id.* at 181) (emphasis added).

Second, exhaustive analysis (388 U.S. 184–195) of the legislative history of Section 8(b)(1)(A) and its proviso, as well as of other provisions of the Act, demonstrated that Congress expressly disavowed an intention to impose "limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status" (*id.* at 195). In short, apart from "some internal union rules which on their face are wholly invalid and unenforceable" (*id.* at 198) (concurring opinion), Congress has generally not sought to regulate under Section 8(b)(1)(A) the internal rules and requirements that the majority of the membership may establish as within their legitimate concern.

Third, the rule in *Allis-Chalmers* related to a matter of legitimate concern to the union *qua* union—the preservation of organizational integrity during a strike (388 U.S. at 181–182).

Fourth, the prevailing concept of the relationship between union and member is that of contract (388 U.S. at 182–183). Although the proviso to Section 8(b)(1)(A) speaks only of rules relating to the acquisition and retention of membership, it clearly suffices to preserve the union's ability to impose fines "as a lesser penalty than expulsion" (*id.* at 191–192) for violation

of the obligations assumed by joining the union. And, nothing in the Act forbids court enforcement of such fines, at least where they are not unreasonable (*id.* at 192–193), since a "lawsuit is and has been the ordinary way by which performance of private money obligations is compelled" (*id.* at 192).

The Court did not suggest, of course, that unions are entirely unaffected by Section 8(b)(1)(A) in exercising their disciplinary powers. One example of such a limitation was provided last Term by *National Labor Relations Board* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418. In that case, again sustaining the Board's interpretation of the Act and its objectives, the Court held that it *is* a violation of Section 8(b)(1)(A) for a union to expel a member because he filed an unfair labor practice charge against it with the Board, in violation of a union rule requiring prior exhaustion of internal remedies. The Court reaffirmed its prior holding that "§ 8(b)(1)(A) assures a union of self-regulation where its legitimate internal affairs are concerned" (391 U.S. at 424), but explained that "where a union rule penalizes a member for filing an unfair labor practice charge with the Board, other considerations of public policy come into play" (*ibid.*). The Court added: "A healthy interplay of the forces governed and protected by the Act means that there should be as great a freedom to ask the Board for relief as there is to petition any other department of government for a redress of grievances. Any coercion used to discourage, retard, or defeat that access is beyond

the legitimate interests of a labor organization" (*ibid.*) (footnote omitted).[11]

Thus, *Allis-Chalmers* states the general rule, defined by the exceptional circumstances of *Shipbuilding Workers*, that union enforcement of legitimate membership rules by reasonable means does not fall within Section 8(b)(1)(A) of the Act unless the effect of the union's rule would be to impair the fulfillment of some substantial policy embodied in the Act.[12] As this Court has said, in another connection, "The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *National Labor Relations Board* v. *Truck Drivers Union*, 353 U.S. 87, 96. The Board's determination in the present case that enforcement of the union's ceiling and banking rule against its members does not constitute the type of "coercion" banned by Section 8(b)(1)(A) fits well within these legal standards governing the Board's function.[13]

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[11] Even this holding was expressly limited—as Mr. Justice Harlan's concurring opinion points out (391 U.S. at 429)—to situations where the grievance charged is not confined to "plainly internal affairs of the union * * *" (*id.* at 424).

[12] Petitioners' contention (Br. 13–15) that *Allis-Chalmers* merely sanctions union discipline designed to maintain the effectiveness of the strike weapon, which enjoys a "special status" under the Act, overlooks the other considerations (see *supra*, pp. 14–16) which underlay the Court's decision. Indeed, at the end of their brief (Br. 21–25), petitioners recognize the broader scope of *Allis-Chalmers*, for they urge the Court to overrule (Br. 23) that recent, carefully considered decision, or at least reconsider some of the premises on which it rests (see also n. 15, *infra*).

[13] See also, *Price* v. *National Labor Relations Board*, 373 F. 2d 443 (C.A. 9), certiorari denied, 392 U.S. 904, sustaining the

B. PETITIONERS WERE CONTRACTUALLY BOUND BY THE UNION BY-LAW IMPOSING CEILINGS ON CURRENTLY REPORTABLE PRODUCTION

In *Allis-Chalmers*, which like the present case involved a local union organized in Wisconsin, the Court observed that the prevailing American doctrine is that the relationship between union and member is contractual. Petitioners concede (Br. 12) that Wisconsin law recognizes this contractual relationship and permits the judicial enforcement of fines imposed for violation of internal union rules.[14] Thus, it is undeniable that the union by-law involved in this case (*supra*, p. 5), requiring members to adhere to the ceilings established by the union, "constituted part of the contract

Board's holding that a union does not violate Section 8(b)(1)(A) by expelling a member for filing with the Board a petition to decertify the union as bargaining agent. There, the Board concluded that the deterrent effect of such discipline on the filing of decertification petitions was not sufficient to outweigh the union's vital interest in protecting itself against members who were seeking to undermine it. Compare *San Francisco-Oakland Mailers' Union No. 18, ITU (Northwest Publications)*, 172 NLRB No. 252, 69 LRRM 1157, September 23, 1968, where the Board held that the union violated Section 8(b)(1)(B) of the Act (which bars restraint of "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances") by fining member-foremen for allegedly misapplying the collective bargaining agreement; the Board ruled that such discipline served no legitimate internal union function and "directly contravened the statutory policy of allowing the Employer an unimpeded choice of representatives for collective bargaining and the settlement of grievances" (69 LRRM at 1159).

[14] See *Local 248, UAW* v. *Natzke*, 36 Wis. 2d 237, 153 N.W. 2d 602.

between member and union * * *." *Allis-Chalmers, supra,* 388 U.S. at 182.

Here, as in *Allis-Chalmers,* employees who had elected to become full members of the union [15] failed to comply with a membership rule of long standing, and, after internal union proceedings which were fair and regular, they were lawfully fined moderate sums, ranging from $50 to $100. The union has made no effort to affect the members' employment status,[16] but only sought to collect the fine by resort to a State court. Hence, this case cannot be said to present the questions left open in *Allis-Chalmers,* whether Section 8(b)(1)(A) would bar as an unfair labor practice an attempt to collect "unreasonably large fines" or would proscribe "arbitrary imposition of fines, or

[15] In the present case, as in *Allis-Chalmers,* there was a union-security provision in the collective agreement, but in both cases the employees were given the options of becoming members of the union or merely paying dues. The petitioners here elected to become full members. In these circumstances, their contention that they were not "voluntary" union members (Br. 24) and thus not bound by union by-laws is foreclosed by one of the express holdings of *Allis-Chalmers* (388 U.S. at 196–197).

[16] One of the cases relied on by petitioners (Br. 20) for the proposition that imposing fines for violation of union-set production quotas is an unfair labor practice is *Associated Home Builders of Greater East Bay, Inc.* v. *National Labor Relation Board,* 352 F. 2d 745 (C.A. 9). In that case, the union, in addition to fining the members (see N. 25, *infra,* p. 27), also applied a portion of dues to pay the fines imposed; since, under the union-security contract, non-payment of dues was cause for dismissal, the Board concluded that this means of implementing the union's rule might impermissibly affect the members' status *as employees* (352 F. 2d at 747). The dissenting opinion in *Allis-Chalmers* (388 U.S. at 206). See, also, n. 23, *infra,* p. 24.

fair

noted this aspect of Associated Home Builders.

punishment for disobedience of a fiat of a union leader * * *" (388 U.S. at 192–193, 195).

C. THE UNION'S CEILING RULE IS ADDRESSED TO A MATTER OF LEGITIMATE INTERNAL CONCERN

As the Trial Examiner noted (R. 70), unions traditionally have been opposed to incentive pay systems, fearing that they could result in:

> (a) employees working themselves out of jobs; (b) * * * the evil of "stakhanovism" under which a new productive norm is set, whereby the piece rate is lowered and the compensation for actual productive effort correspondingly reduced; (c) lower grade employees by excessive dissipation of their allowances, earning more than those in the higher ones, thus dislocating the actual pay scale and bringing about morale-threatening jealousies, as well as undermining the health-protecting purposes of the allowances.

See also Appendix B to the Examiner's Intermediate Report (R. 120–125). The ceiling rule first adopted

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The same qualification must be applied to petitioner's citation (Br. 23) of *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 40, for the proposition that the Act allows employees to "be good, bad, or indifferent members" of a labor union. This statement was made in the context of the holding that the Act "insulate[s] employees' jobs from their organizational rights" (*ibid.*), so that it is an unfair labor practice for a union *to induce an employer* to discharge an employee for violation of a union rule. The instant case is decisively different.

by the union in 1944—and adjusted periodically since—reflects these concerns.[17]

Contrary to petitioners' contention (Br. 16), the Union ceiling rule does not "constitute pure and simple featherbedding designed to provide work for more employees than the job requires."[18] Rather, the rule was intended to discourage some of the union members (*e.g.,* younger and lower grade employees) from skimping on the employer's reasonable allowances for non-production time in the piecework rates, in order to increase their output and current earnings far in excess of what is contemplated by the hourly rates fixed by the collective agreement. The union reasonably feared that, absent a limitation, these members would demoralize and even force the layoff of

[17] The rule itself explains that its objective is "to protect members of the Union in their employment and to give them as much security as the industry can provide" (R. 48). Norman Wold, a Union leader in 1944, testified that the impetus for adoption of the ceiling rule was the fear of older employees that the performance of younger, more vigorous employees would jeopardize their jobs. He added that, "98 percent of the fellows right today are 100 percent for this ceiling because it provides jobs. It provides for not too much pressure working piece work. * * *" (R. 44-45.)

[18] Certainly the facts of this case (see, *e.g.*, pp. 5-6, *supra*) do not support the assertion that the "effect of the union action [in this case] is to promote extreme featherbedding practices * * *" (Br. 20 n. 7).

It may be noted, moreover, that "the legislative history of the Taft-Hartley Act demonstrates that when the legislation was put in final form Congress decided to limit [featherbedding] but little by law." *American Newspaper Publishers* v. *National Labor Relations Board*, 345 U.S. 100, 106. See, also, *National Labor Relations Board* v. *Gamble Enterprises*, 345 U.S. 117. Cf. *Bro. of Locomotive Firemen* v. *Chicago, Rock Island & Pacific R.R.*, 69 LRRM 2625, November 18, 1968.

other members who, though producing at the level established by the contract, were unwilling or unable to cut into the non-production allowances; would undermine the health-protecting purposes of the allowances; and would dislocate the pay differentials between the various work grades. It is scarcely necessary to rely on the Board's administrative expertise to conclude that such concerns are essential to a labor union. It would be a gross understatement to say that a union has a "legitimate" interest in protecting the job opportunities of its members,[19] avoiding jealousy and dissension among them, and preserving the wage differentials and health allowances which have been negotiated for them.

The ceiling rule involved in this case is reasonably related to achieving these legitimate union objectives, and it does so with the minimum impact on employee and employer interests. Thus, the rule does not preclude the employee from producing in excess of the ceiling, nor does it keep such excess production out of the company's operations. It merely requires an employee to forego immediate compensation for the excess production, and instead to "bank" those earnings for a later time, when their receipt would be less disruptive.[20] Such a rule, the Board has determined, rep-

[19] See *National Woodwork Manufacturers* v. *National Labor Relations Board*, 386 U.S. 612.

[20] Indeed, as the court below noted, the ceiling rule is less severe in its economic impact on union members than the strike rule involved in *Allis-Chalmers*. There the employees were required to forego working altogether, while here "the employees were permitted to work even in excess of ceilings, with the additional earnings [merely] deferred" (R. 159).

resents a reasonable accommodation of interests and the union may, without violating the Act, require its members to respect it.

D. THE CEILING RULE DOES NOT CONFLICT WITH ANY COUNTERVAILING FEDERAL POLICY

1. Petitioners argue at some length (Br. 15–18) that the union's ceiling rule encourages a slowdown or limitation of production of the kind which is "not favored by the law".[21] But this argument is wide of the mark, for petitioners' contentions are ill-suited to this record. As we have seen (*supra*, pp. 5–6), the union rule in this case does not preclude an employee-member from producing in excess of the ceiling if he so desires, but merely from obtaining immediate payment for his excess production. Moreover, while the inability to obtain such payment may in some cases deter him from producing greatly in excess of the ceiling, the ceiling is set well above the agreed-upon average rate of production. Thus, the ceilings can in no instance cause a "slowdown" or "interference" with production. As the Trial Examiner found (R. 73), there is no suggestion "that the guaranteed hourly rates have been so set that the employee, for the pay he receives, has not given the requisite *quid pro quo* in production."[22] Nor is there anything in the union's

[21] The cases relied on by petitioners (Br. 17) indicate only that the Act *permits employers* some flexibility in responding to unauthorized slowdowns. See, *e.g.*, *General Electric Co.*, 155 NLRB 208, 220–221; *Celotex Corp.*, 146 NLRB 48, 49.

[22] The record shows that, when the company promulgated orders forbidding such practices as card playing and reading during working hours, those orders were fully obeyed, with the

ceiling rule which precludes the company from disciplining employees for failing to produce in accordance with the machine rate or turning out less than a full day's work.[23]

The union rule at issue here merely reflects a collective and concerted unwillingness to forego the reasonable non-work allowances which time studies and the contract have afforded employees (see n. 17, *supra*).

2. Nor is there substance to petitioners' contention (Br. 19–21) that the ceiling-banking system is in derogation of the collective bargaining process. Petitioners' argument that the union rule offends the Act's policy of promoting collective bargaining rests on the assumption that, simply because the company preferred not to have such a system and it was not

cooperation of the union stewards (R. 36, 38). The company has issued no order barring the early shut-down of machines (R. 37). However, when there is such a shut-down, the remainder of the employee's time is spent in preparing the machines for the next day's production, and the employee is not paid by the Company for such down time (R. 41–42).

[23] The cases cited by petitioners (Br. 17), as well as the restrictions referred to by Professor Summers (Br. 18), deal with the conventional slowdown situation, where the employee refuses to produce at the rate fixed by the collective agreement or by established practice; such conduct is generally considered unprotected by the Act.

In *Printz Leather Company*, 94 NLRB 1312, the union was found to have committed an unfair labor practice by inducing the employer to discharge the recalcitrant employees as a means of enforcing its attempt to cut back production; it was this attempt to affect status *as employees* that made the union's conduct unlawful (see *supra*, p. 19). Such clearly unlawful means were also used in *National Labor Relations Board* v. *Bro. of Painters*, 242 F. 2d 477, 481 (C.A. 10) (Br. 20).

incorporated in the collective agreement, the system constitutes an illegal, unilateral alteration of the conditions of employment jointly negotiated by the union and the company. The fallacy most clearly appears from petitioners' argument (Br. 19) that if a particular change "can" be achieved through a collective bargaining agreement it "must" be achieved in that way, or not at all.[24] But the bargaining process includes not only the working out of the formal terms of the collective agreement, but also the making of numerous informal accommodations which augment the formal agreement. See Shulman, ***Reason, Contract, and Law in Labor Relations,*** 68 Harv. L. Rev. 999, 1003–1005 (1955). The record in this case demonstrates that the ceiling and banking system is such a *bilateral* accommodation.

Thus, while the ceiling-banking system is not explicitly incorporated in the collective agreement, the facts summarized in the Statement (*supra*, pp. 6–8) show that its development over the years and its present status are in large measure the product of bilateral adjustment and compromise. As the Trial Examiner found (R. 68, 69):

> Among the subjects embraced by the contract negotiations is the setting of the ceiling rate. The purpose of doing so is to bind not the Employer but the Union. The Employer retains its freedom to pay any member who reports production yielding him in excess of ceiling, but the Union binds itself in respect to the limit

[24] Compare *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 210, 214; *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 741–743, 745, 747–748.

> which it will permit its members to earn above the guaranteed machine rate. The higher the ceiling the greater the productive leeway. And so in the typical negotiations, the Employer begins by asking the Union to agree to eliminate the ceiling and, as the second alternative, proposes a raise in the ceiling. As an inducement therefor, it may offer a concession in the form of a raise in the guaranteed hourly rate, and the raise in turn conditions the extent to which the Union will agree to raise the ceiling. * * *
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> * * * * *
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> The status thus achieved by the ceiling program is the product of hard bargaining, however diverse the philosophics voiced at the bargaining table by the respective representatives. * * *

Indeed, petitioners concede (Br. 3) that, "The ceilings were the subject of collective bargaining between the company and the union from time to time."

Moreover, as previously discussed (*supra*, pp. 6–8), the company recognizes the ceiling-banking system in the daily operation of the plant, cooperating with the union in its implementation. If the employee adheres to the ceilings, the company permits him to bank excess production for later payment, and will pay him for this production during subsequent non-productive periods. The company supplies the union with the employees' work cards so that it can police compliance with the ceilings, and also pays the union stewards for the time spent in checking the cards. The company also uses the ceilings as a basis for making adjustments in the machine rate and for disposing of em-

ployee grievances. Accordingly, this case does not present the situation posited by petitioners (Br. 20), of a union attempting to gain unilaterally, by abuse of its disciplinary power over its members, a pay system which it was unable to achieve through the collective agreement.[25]

3. In this context, it cannot be said that the interest of the union in enforcing compliance by its members with a by-law must yield, as in *Shipbuilding Workers, supra,* to some critical statutory policy with which it conflicts. The court below thus properly concluded that the Board's order conformed to the general rule, expressed in *Allis-Chalmers,* that the union's action in fining its members, and in seeking to collect those fines through court action, was not an unfair labor practice within the purview of Section 8(b) (1)(A) of the Act.

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[25] It might be suggested, on the contrary, that it is *petitioners* who seek to change a plant practice of long standing which is the product of a bilateral accommodation between the company and the union, and thereby to achieve a result which the company was unable to obtain at the bargaining table—the end of the ceiling system. Significantly, the charges here were filed, not by the company, but by individual employees.

Associated Home Builders v. *National Labor Relations Board* (*supra*, n. 16, p. 19), relied on by petitioners (Br. 20), is distinguishable. There the court, without squarely passing upon the question whether Section 8(b)(1)(A) was violated, suggested that the union had violated its bargaining duty, under Section 8(b)(3) of the Act (29 U.S.C. 158(b)(3)), by fining members to enforce a production ceiling unilaterally established by the union and directly *contrary* to the provisions of the negotiated bargaining agreement (352 F. 2d at 751). As we have shown, the ceiling rule in the instant case has significant bilateral aspects, and it is not contrary to the provisions of the collective agreement.

II.

THE PETITION FOR A WRIT OF CERTIORARI WAS FILED OUT OF TIME

On March 5, 1968, the court of appeals filed its opinion in this case, upholding without equivocation the Board's dismissal of the complaint (R. 151, 161). On the same day, it entered a judgment providing as follows (R. 162–163):

> [I]t is ordered by this Court that the petition to review and set aside the order of the National Labor Relations Board dated May 18, 1964, denying the motion of the petitioners for reconsideration of the decision and order of the National Labor Relations Board dated January 17, 1964, be, and the same is hereby DENIED in accordance with the opinion of this Court filed this day; and upon presentation, an appropriate decree will be entered.[26]

On April 16, 1968, the court issued a decree which simply restated the terms of the judgment (R. 167–168).

Although Congress has specified that a petition for a writ of certiorari must be filed "within ninety days after the entry of [the] judgment or decree" (28 U.S.C. 2101(c)), the petition in the present case was not filed until July 6, 1968. We submit that the

[26] The fact that the order entered on this date (R. 62–63) was signed by the clerk, rather than by the circuit judges, is legally immaterial. As this Court has said: "Nor does the fact that the order was prepared by the clerk and bears his signature detract from its quality as a judgment. A judgment 'is the act of the court' * * * even though a clerk does all of the ministerial acts, as here, in conformity with his court's standing instructions." *Commissioner* v. *Estate of Bedford*, 325 U.S. 283, 286.

period within which to invoke this Court's certiorari jurisdiction began to run on March 5, 1968, when the court below entered its judgment, and therefore that the petition, which should have been filed by June 3, 1968, was fatally out of time.

In determining when a judgment is final for the purposes of petitioning for review, this Court has stated: "The judgment for our purposes is final when the issues are adjudged. * * * Our test is a practical one. When the case is decided, the time to seek our review begins to run." *Market Street Railway* v. *Railroad Commission*, 324 U.S. 548, 551–552.[27] Reiterating this same test in *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, the Court rejected as immaterial the fact that a subsequent order purported to be the "Final Decree", since that order simply "reiterated, without change, everything which had been decided [in the earlier judgment]" (344 U.S. at 212). "The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." (*ibid.*). Accord: *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 379.

The March 5 judgment in this case satisfies this test. It plainly constituted a full, effective, and unambiguous determination of the rights and duties of the parties. The Board order sought to be reviewed consisted simply of the dismissal of a complaint and con-

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[27] The Court there held a judgment to be final although the rules of the state court were to the contrary.

tained no affirmative provisions to be enforced. The denial of the petition to review this order on March 5, therefore, left no further occasion for any exercise of discretion by the court below, and the procedural posture of the case together with the decision of the court of appeals made this obvious to all concerned.[28] In these circumstances, we believe that it is immaterial that the March 5 judgment concluded with the statement, "upon presentation, an appropriate decree will be entered" (R. 163), and that such a decree was entered on April 16. For purposes of computing the time for petitioning for certiorari, as this Court has formulated the tests, this second judgment was superfluous; it did no more than restate what had been ordered by the March 5 judgment. See *Department of*

[28] Seventh Circuit Rule 14(1), like new Rule 19, Fed. R. App. P. (effective July 1, 1968), provided for the deferred filing of a final judgment or decree only where the court of appeals was *enforcing* an agency order in whole or in part. Seventh Circuit Rule 23 provided that, "In all cases except that of a decree *enforcing the order* of an administrative tribunal, judgment shall be entered on the date the opinion is filed" (emphasis added). Here, there was no agency order to enforce as the Board had dismissed the complaint. Nor was there a need, as in the usual enforcement case, for a hiatus in order to formulate an appropriate injunctive decree. Therefore, Rule 23, not 14(1), was applicable.

Petitioners contend that they were not notified of the entry of judgment of March 5 (Br. 30). However, they received a copy of the opinion, and they must be charged with knowledge that the Seventh Circuit's rules required immediate entry of a judgment.

Nor is it significant that the Board did not challenge petitioners' application for an extension of time within which to file a petition for certiorari (Br. 31, n. 16). Since the application was filed before June 3, 1968, and the Board was not opposed to granting the extension sought, it had no occasion to consider petitioner's assumption that the 90-day time period expired on July 15, 1968.

Banking v. *Pink*, 317 U.S. 264, 268; *Cole* v. *Violette*, 319 U.S. 581, 582.

Application of these jurisdictional standards to this case would not work "a manifest injustice" (Br. 30). Long ago this Court responded to such an argument by noting that, "In these days of rapid communication, the statutory allowance of three months is more than ample for an unsuccessful litigant to determine whether to seek further review." *Commissioner* v. *Estate of Bedford, supra,* 325 U.S. at 288. Moreover, the standard manual for practice before this Court expressly advises litigants that in Labor Board cases, even where the Board's order is to be *enforced,* if the court enters a judgment on the day the opinion is released the time for petitioning "clearly runs from the entry of that judgment", and not from the entry of the subsequent decree. Stern & Gressman, *Supreme Court Practice* (3d ed. 1962) p. 203, n. 7.[29]

[29] Petitioners rely (Br. 27-28) on *Rubber Co.* v. *Goodyear*, 6 Wall, 153, to support the timeliness of their petition. But that decision, long pre-dating the enactment of the 90-day statute involved here, merely held that an appeal had been taken within the proper Term when an earlier order lacked the form or the comprehensiveness of a final judgment (*id.* at 155). Neither of these defects exists in the March 5 judgment in the present case.

CONCLUSION

The writ of certiorari should be dismissed for want of jurisdiction, or, if the Court determines the petition to have been timely, the judgment below should be affirmed.

Respectfully submitted.

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